UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAY GILSON,

Plaintiff,

v.

EVERGREEN AT TALBOT ROAD L.L.C.,

Defendant.

CASE NO. C04-02126C

ORDER

This matter comes before the Court on the Defendant's Motion to Compel Discovery of Medical Records (Dkt. No. 18). Having reviewed the materials submitted by the parties and determined that oral argument is not necessary, the motion is GRANTED in part and DENIED in part for the reasons set forth below.

I. BACKGROUND

Plaintiff filed a complaint alleging that Defendant violated the Family Medical Leave Act ("FMLA") when it did not restore the Plaintiff to his position after he took emergency medical leave under the FMLA. (Dkt. No. 7.) On February 6, 2004, Plaintiff felt lightheaded and fell while at work. (Def.'s Mot. 2.) Plaintiff then left to see Dr. Sy, his primary care physician, whose notes indicate that February 6, 2004 was to be Plaintiff's last day on methadone. (Luhn Decl. Ex. F.) On February 9, 2004,

Plaintiff's daughter delivered a note from Dr. Sy to Defendant, stating that Plaintiff would be unable to work from February 6, 2004 to February 28, 2004 because of a medical reason. (*Id*. Ex. B.) Plaintiff was terminated from his job on February 12, 2004. (*Id*.)

Defendant's initial discovery disclosure was accompanied by a general medical records release to be signed by Plaintiff. (*Id*. ¶ 3.) Plaintiff's initial disclosure did not contain any signed medical release. (*Id*. Ex. B.) The day after receiving Plaintiff's initial disclosures, Defendant's counsel initiated a telephone conference with Plaintiff's counsel. (*Id*. ¶ 6.) Plaintiff's counsel refused to provide the general medical release requested by Defendant. (*Id*.) Defendant then sent Plaintiff its "First Set of Interrogatories and Requests for Production" that requested identification of Plaintiff's health care providers for the preceding ten years (Interrog. No. 4) and copies of Plaintiff's medical records (Req. for Produc. No. 2). (*Id*. Ex. C.) Plaintiff's response did not contain any signed medical records release. (Def.'s Mot. 5.) After communication on the matter between the parties' counsel, Plaintiff's counsel faxed to Defendant a signed medical records release permitting Defendant to obtain Dr. Sy's medical records for the time period of February 6, 2004 to March 8, 2004. (Luhn Decl. Ex. G.)

During Plaintiff's deposition he testified that he had taken methadone to get off prescription pain medication that he had abused, that he received treatment at Evergreen Treatment Center prior to February 6, 2004, and that he received prescription medication from other medical facilities prompting this need for methadone treatment. (Def.'s Mot. 6.) Defendant filed this motion to compel Plaintiff to sign a general medical records release in order to obtain medical records from the additional treatment providers or facilities where Plaintiff received treatment. (*Id*. at 7.) After Defendant filed its motion, Plaintiff provided Defendant with medical releases, unrestricted in time, for Dr. Sy, the two facilities that prescribed Plaintiff the pain medication that he became dependent upon, and the Evergreen Treatment Center where Plaintiff was undergoing methadone treatment when he took leave from the Defendant in February 2004. (Pl.'s Resp. 6.) Plaintiff still refuses to provide a signed general medical records release for all health care providers as requested by Defendant's motion. (*Id*. at 2.)

II. ANALYSIS

If a responding party has not answered an interrogatory or request for production, or has answered incompletely, the discovering party may move for an order compelling a sufficient answer. Fed. R. Civ. P. 37(a)(2)(B), (a)(3). However, such a motion must be accompanied by a certification that the movant conferred, or attempted to confer, with the non-disclosing party in an effort to resolve the dispute. *Id.* 37(a)(2)(A). The Defendant here has demonstrated that it has conferred with the Plaintiff in an attempt to resolve the discovery dispute before bringing the matter before the Court. (Def.'s Mot. 6; Luhn Decl. ¶ 15.)

While the party seeking discovery must move the Court for an order under Rule 37(a) compelling answers, the burden is on the responding party to justify its objections or failure to provide complete answers to the interrogatories or requests for production. *See* Fed. R. Civ. P. 33(a) (Adv. Comm. Notes 1970). Defendant moves for an order directing Plaintiff to provide an unrestricted general medical records release that will permit Defendant to conduct discovery into the information sought by Interrogatory No. 4 and Request for Production No. 2. Plaintiff objected to the request for medical records not related to the treatment of the specific health condition for which he claims FMLA entitlement and bases his objection on the grounds that such information is not relevant and not reasonably designed to lead to discoverable information. (Luhn Decl. Ex. D.) In addition to the relevancy objection, Plaintiff objects in his briefing on the basis of a physician–patient privilege.

The physician–patient privilege, asserted by Plaintiff in his response to this motion (Pl.'s Resp. 10), does not apply in this case. The federal law of privilege governs federal question cases even when the Court exercises supplemental jurisdiction over pendent state law claims. *Religious Tech. Center v. Wollersheim*, 971 F.2d 364, 367 n.10 (9th Cir. 1992) (refusing to apply California litigation privilege in copyright action with pendent state law claims); *Hankcock v. Hobbs*, 967 F.2d 462, 466–67 (11th Cir. 1992) (courts confronting issue have uniformly held federal privilege law applies in federal question cases with pendent state law claims); *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992) (following

Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455 (N.D. Cal. 1978) (Federal privilege law "should not be cast aside simply because pendent state claims are raised in what is primarily a federal question case.")); *Keith H. v. Long Beach Unified School Dist.*, 228 F.R.D. 652, 656 (C.D. Cal. 2005). There is no physician–patient privilege recognized under federal common law or in the Ninth Circuit. *In re Grand Jury Proceedings*, 867 F.2d 562, 564 (9th Cir. 1989) (noting Circuit's refusal to adopt a physician–patient privilege), *abrogated on other grounds by Jaffee v. Redmond*, 518 U.S. 1 (1996) (recognizing a psychotherapist–patient privilege in federal law); *In re Grand Jury Proceedings*, 801 F.2d 1164, 1169 (9th Cir. 1986) (citing *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1997)); 3 Jack B. Weinstein and Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE § 514.02 (2d ed. 2005) ("No doctor–patient privilege exists at federal common law."). Therefore, Plaintiff may not assert physician–patient privilege to prevent Defendant from discovering the information it seeks. Further, even if there were any applicable physician–patient privilege in this case, it would be waived by the commencement of this action, where the medical condition at issue here was raised by Plaintiff's claim. *See Sherman v. State*, 128 Wash. 2d 164, 203 (1995) (Plaintiff waived physician–patient privilege when he filed action for damages that included claim of "handicap discrimination.").

Plaintiff's only other objection and reason for not providing the medical release requested by the Defendant is that information that could be acquired under such a release is irrelevant. (Luhn Decl. Ex. D; Pl.'s Resp. 6, 9.) Parties may discover any relevant, unprivileged information that is admissible at trial or reasonably calculated to lead to admissible evidence. Fed. R. Civ. P. 26(b)(1). Relevancy is construed broadly, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.12 (1978), to encompass "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). Thus, discovery is not limited to the issues raised by the pleadings or the merits of a case. *Sanders*, 437 U.S. at 351.

Defendant claims that the documents it seeks through this motion are necessary to determine whether Plaintiff's condition was a "serious health condition" defined in the FMLA and whether this

condition was foreseeable based on planned medical treatment, both integral issues to Defendant's defense. (Def.'s Mot. 8–9.) Plaintiff argues the medical records throughout his whole life are irrelevant to Defendant's defenses that Plaintiff did not suffer a "serious health condition" or that Plaintiff was required to and did not provide adequate notice to Defendant before taking leave. (Pl.'s Resp. 6–7.)

Defendant's request for an order directing Plaintiff to sign a general medical records release is unnecessarily broad. Such a release would allow Defendant to acquire the medical records of Plaintiff pertaining to matters wholly unrelated to those at issue in this case. Nevertheless, a general medical release may cover some relevant information that is yet undisclosed. Plaintiff's medical records—relating to the events and circumstances that form the basis of Plaintiff's claim, and his prescriptions for pain medication and resulting methadone treatment for the abuse of prescription pain medication—are relevant. *See Wemmitt-Pauk v. Beech Mountain Club*, 140 F. Supp. 2d 571, 581 (W.D.N.C. 2001) (dismissing FMLA claim where no medical records submitted of any "serious health condition" and no evidence that Plaintiff gave employer sufficient notice of leave). Medical records relating to any other prescription pain medications or any other methadone treatments are also relevant to Defendant's theory that Plaintiff knew or should have known that he would be requiring leave under the FMLA.

Plaintiff has already provided Defendant with medical releases, unrestricted in time, for Dr. Sy (Plaintiff's primary care physician who wrote note a note to Defendant indicating that Plaintiff would be unable to work due to medical reasons), the two facilities where Plaintiff was prescribed the pain medication he became dependent on, and the Evergreen Treatment Center where Plaintiff was undergoing methadone treatment at the time he took leave from Defendant in February 2004. (Pl.'s Resp. 9.) Medical records obtained under such releases are relevant. However, it is unclear from the record whether the medical releases provided by Plaintiff cover all of the facilities where he has been prescribed pain medication and all of the facilities where he has undergone methadone treatment in the past. Such additional information, if it exists, is relevant to Defendant's defenses that Plaintiff did not suffer from a "serious medical condition" and that Plaintiff did not give adequate notice of his leave, and therefore it is

discoverable.

For these reasons, it is hereby ORDERED:

(1) Defendant's request for a general medical release from Plaintiff is GRANTED in part and DENIED in part.

(2) Plaintiff is ORDERED to provide Defendant with signed medical records releases for all providers and facilities that have prescribed him pain medication and all facilities where he has undergone methadone treatment for the previous 10 years, to the extent he has not done so already.

SO ORDERED this 1st day of November, 2005.

John C. Coughenour
United States District Judge